

Fall 1994

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## Recommended Citation

John M. Fontecchio, *The General Agreements on Trade in Services: Is it the Answer to Creating a Harmonized Global Securities System*, 20 N.C. J. INT'L L. & COM. REG. 115 (1994).

Available at: <http://scholarship.law.unc.edu/ncilj/vol20/iss1/2>

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# The General Agreements on Trade in Services: Is it the Answer to Creating a Harmonized Global Securities System

## **Cover Page Footnote**

International Law; Commercial Law; Law

# The General Agreement on Trade in Services: Is It the Answer to Creating a Harmonized Global Securities System?

John M. Fontecchio†

## I. Introduction

Today there exists a global securities market that is almost immeasurable in size. Indeed, the value of securities in the markets of the world is thought to be in the tens of trillions of dollars.<sup>1</sup> However, it is only in the last fifteen years that there has been a dramatic increase in the amount of trading between nations' markets in debt and equity securities.<sup>2</sup> For the United States alone, \$130.9 billion in foreign equity securities transactions and \$335 billion in foreign debt securities transactions were completed in 1990, compared to \$24.8 billion and \$85.2 billion, respectively, in 1985.<sup>3</sup> On the world scene, investors placed \$250 billion into non-domestic securities in 1984, and by 1987, that number had risen to \$1.281 trillion.<sup>4</sup>

With the virtual explosion of world securities trading, the problems created by the lack of harmonization of laws that regulate

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<sup>1</sup> Peter A. Millspaugh, *Global Securities Trading: The Question of a Watchdog*, 26 GEO. WASH. J. INT'L L. & ECON. 355, 356 (1992).

<sup>2</sup> From 1980 to 1990, foreign trading in United States stocks grew from approximately \$75 billion annually to \$417 billion, an increase of 456%. *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1993: Hearings Before the Subcomm. of the Comm. on Appropriations, Part 6*, 102d Cong., 2d Sess. 590 (1992). Foreign purchases of United States debt securities jumped more than 3000% in the same period, from \$123 billion to \$3.9 trillion annually. *Reauthorizations for the Securities and Exchange Commission, 1992-94: Hearing Before the Subcomm. on Securities of the Sen. Comm. on Banking, Housing, and Urban Affairs*, 102d Cong., 1st Sess. 14 (1991). As for the United States, mutual and pension funds have been substantially increasing their international investments as well. In 1980 just over \$20 billion were invested overseas, but by 1990 that had increased to \$250 billion. Chris Welles & Monica Roman, *The Future of Wall Street: Why Our Financial System Will Never Be the Same*, BUS. WK., Nov. 5, 1990, at 118, 122.

<sup>3</sup> Multijurisdictional Disclosure and Modification to Current Registration and Reporting System for Canadian Issuers, Securities Act Release No. 6902, [1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,812, at 81,860 (June 21, 1991) [hereinafter MJDS].

<sup>4</sup> Following the stock market crash on October 19, 1987, investment dropped off drastically. However, after the crash, investment rose steadily through 1990. OFFICE OF TECHNOLOGY ASSESSMENT, PUB. NO. OTA-BP-CIT-66, TRADING AROUND THE CLOCK: GLOBAL SECURITIES MARKETS AND INFORMATION TECHNOLOGY-BACKGROUND PAPER 30 (July 1990) [hereinafter TRADING AROUND THE CLOCK].

the global securities market have exasperated an unprepared system.<sup>5</sup> This lack of harmonization causes issuers of securities, financial service providers, governments, and investors to funnel substantial resources into understanding and complying with more than one country's laws. This Article proposes that the General Agreement on Trade in Services (GATS),<sup>6</sup> recently completed at the Uruguay Round, may be the best answer for solving the problems accompanying harmonization.

When one considers the GATS, it must be viewed in the shadow of the General Agreement on Tariffs and Trade (GATT).<sup>7</sup> The two agreements address similar issues in closely related manners,<sup>8</sup> and they both utilize some of the same supplementary agreements, such as the Understanding on Rules and Procedures Governing the Settlement of Disputes.<sup>9</sup> This similarity results principally from the agreements falling under the overall umbrella of the Multilateral Trade Negotiations (MTN).<sup>10</sup> Since the GATT and the GATS share a common history and

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<sup>5</sup> "Harmonization is the process of reducing the regulatory disparities among mutually accessible markets, through the development of common or mutually compatible regulatory regimes, standards, and practices." *Id.* at 75.

<sup>6</sup> General Agreement on Tariffs and Trade-Multilateral Trade Negotiations (the Uruguay Round): General Agreement on Trade in Services, Dec. 15, 1993, 33 I.L.M. 44 [hereinafter GATS]. Countries with specific commitments as a result of the negotiations on trade in services include Algeria, Antigua and Barbuda, Antilles (Netherlands), Argentina, Aruba (Netherlands), Australia, Austria, Bangladesh, Barbados, Belize, Benin, Bolivia, Brazil, Burkina Faso, Cameroon, Canada, Chile, China, Colombia, Congo, Costa Rica, Côte d'Ivoire, Cuba, Cyprus, Czech Republic, Dominican Republic, El Salvador, Egypt, The European Community and its Member States, Fiji, Finland, Gabon, Ghana, Guatemala, Guyana, Honduras, Hong Kong, Hungary, Iceland, India, Indonesia, Israel, Jamaica, Japan, the Republic of Korea, Macau, Madagascar, Malaysia, Malta, Mauritius, Mexico, Morocco, Mozambique, Myanmar, Namibia, New Caledonia (France), New Zealand, Nicaragua, Niger, Nigeria, Norway, Pakistan, Paraguay, Peru, Philippines, Poland, Romania, Saint Lucia, Saint Vincent and the Grenadines, Senegal, Singapore, Slovak Republic, South Africa, Sri Lanka, Suriname, Swaziland, Sweden, Switzerland, Tanzania, Thailand, Trinidad and Tobago, Tunisia, Turkey, Uganda, United States, Uruguay, Venezuela, Zambia, and Zimbabwe. *Id.*, Schedule of Specific Commitments—Appendix, at 78-80.

<sup>7</sup> General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187 [hereinafter GATT].

<sup>8</sup> For example, both the GATT and the GATS contain Most Favored Nation clauses which address the issue of according like treatment to all the other member nations in the areas of tariffs and the supply of services. *Id.*, 61 Stat. at A12, 55 U.N.T.S. at 196 (art. I, para. 1); GATS, *supra* note 6, art. II, para. 1, at 49.

<sup>9</sup> General Agreement on Tariffs and Trade-Multilateral Trade Negotiations (the Uruguay Round): Understanding on Rules and Procedures Governing the Settlement of Disputes, Dec. 15, 1993, 33 I.L.M. 112 [hereinafter DSU]. The DSU primarily comes into the GATS and GATT through the same numbered articles, XXII and XXIII. GATS, *supra* note 6, art. XXII, paras. 1-2, at 63; *Id.*, art. XXIII, at 63-64; GATT, *supra* note 7, 61 Stat. at A64-A65, 55 U.N.T.S. at 266-68 (arts. XXII & XXIII).

<sup>10</sup> The Agreement Establishing the Multilateral Trade Organization (MTO) provides in Article XVI:

1. Except as otherwise provided for under this Agreement or the Multilateral Trade Agreements, the MTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES of the GATT 1947 and the bodies established in the framework of the GATT 1947.

2. To the extent practicable, the Secretariat of the GATT 1947 shall become the Secretariat of the MTO, and the Director-General to the CONTRACTING

offer similar ideals, this article refers to the GATT history to try to clarify ambiguities in the recently completed GATS.

The principle of removing obstacles that hinder the use of capital to its most advantageous end is one of the most important ideas that demonstrates the close link between the GATS and the GATT.<sup>11</sup> When trading in goods, a seller's price can be made less competitive with the addition of a tariff, which is imposed by the government of an importing country. The purpose of the GATT is to eliminate tariffs, or in the alternative, to reduce them. In the securities markets, the lack of harmonization in regulations creates disarray that impedes the movement of capital from one nation to another. The sales price for providing services is raised by the costs of compliance with governmental and non-governmental regulations that vary from nation to nation. The result of the higher costs is to discourage a party from using a financial services provider for international transactions.<sup>12</sup>

Several other working bodies have tried to move the world's securities markets into at least partial harmony in order to alleviate the financial burden created by each nation self-regulating its securities markets. But these groups generally suffer from either a lack of coordination and influence, or they are not inspired with the intention of making substantial changes toward harmony in the securities markets.<sup>13</sup> The GATS, on the other hand, was specifically created to promote "a multilateral framework of principles and rules for trade in services with a view to the expansion of trade under conditions of transparency and progressive liberalization . . . ."<sup>14</sup> In addition, its membership would be comprised of world governments, and this would give the agreements created through the GATS process a measure of respectability and influence.

To explain how the GATS will serve as a catalyst for harmonization, it is necessary to provide an overview of the historical problems in

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PARTIES to the GATT 1947, until such time as the Ministerial conference has appointed a Director-General . . . .

General Agreement on Tariffs and Trade-Multilateral Trade Negotiations (the Uruguay Round): Agreement Establishing the Multilateral Trade Organization [World Trade Organization], Dec. 15, 1993, 33 I.L.M. 13, 23 (art. XVI).

<sup>11</sup> Richard H. Snape, *Principles in Trade in Services*, in *THE URUGUAY ROUND, SERVICES IN THE WORLD ECONOMY* 5 (Patrick A. Messerlin & Karl P. Sauvant eds., 1990).

<sup>12</sup> "Few doubt that aggregate worldwide welfare would be enhanced by permitting finance to flow freely to the uses selected by an international free market process. All recognize that uncoordinated national regulatory systems are barriers to this flow." Joel P. Trachtman, *Recent Initiatives in International Financial Regulation and Goals of Competitiveness, Effectiveness, Consistency and Cooperation*, 12 NW. J. INT'L L. & BUS. 241, 243 (1991). "From a macro-economic viewpoint, the free transfer of funds and the globalization of the securities market guarantees the most efficient distribution of scarce investment resources. Artificial impediments and restrictions on the free flow of capital hinder economic growth and the maximization of overall wealth." Michael Gruson, *The Global Securities Market: Introductory Remarks*, 1987 COLUM. BUS. L. REV. 303, 306 (1987).

<sup>13</sup> See Millspaugh, *supra* note 1, at 370. See also *infra* notes 47-57 and accompanying text.

<sup>14</sup> GATS, *supra* note 6, *pmbl.*, at 48.

this area and the present scheme of regulation. In Part II, this Article summarizes the rise of the international securities markets, discusses the current lack of uniformity of national securities regulations, and gives some of the causes for the lack of harmonization and the alternative approaches at resolving issues of harmonization. Part III outlines the scope of the GATS, and discusses the manner in which regulations of financial services are brought within its purview. In Part IV, particular GATS principles and rules are examined in light of issues of market regulation. The purpose is to determine whether the GATS presents a feasible approach for creating a more harmonized regulatory scheme. Part V concludes with comments about how effective the GATS may be in addressing the need for a harmonized global securities market.

## II. Today in the Securities Markets

### A. *The Global Securities Market*<sup>15</sup>

The Office of Technology Assessment defines the "global securities market" as:

the cross-listing of securities in several countries, cross-national portfolio diversification and hedging, holding membership (generally through affiliates) in another country's exchanges, legal or contractual ties between exchanges, electronic systems for 24-hour trading, 'passing the book', the development of cross-national stock index derivative products, and related phenomena such as multinational primary offerings of stock and international mutual funds.<sup>16</sup>

Although it is controversial whether a completely harmonized global securities market would be a singular market with one world regulator, or if it would continue as various national markets following one regulatory scheme,<sup>17</sup> the effect of a global securities market, in the eyes of financial theorists, would be that capital markets (bond or stock markets) would reflect similar return and risk characteristics for similar bonds and stocks.<sup>18</sup> In addition, a global securities market would allow an issuer or borrower to raise capital from anywhere in the world that had access to the market, rather than being generally limited to the national markets of the issuer or borrower. At the same time, on the secondary market, traders would be able to trade with others around the globe, twenty-four hours per day on a single electronic trading market.<sup>19</sup>

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<sup>15</sup> Throughout this Article the movement toward a world securities market will be referred to as the "global securities market" or the "international securities market."

<sup>16</sup> TRADING AROUND THE CLOCK, *supra* note 4, at 2.

<sup>17</sup> David E. Van Zandt, *The Regulatory and Institutional Conditions for an International Securities Market*, 32 VA. J. INT'L L. 47, 54-56 (1991). See Trachtman, *supra* note 12, at 248-50.

<sup>18</sup> Van Zandt, *supra* note 17, at 50. See Mustafa N. Gultekin et al., *Capital Controls and International Capital Market Segmentation: The Evidence from the Japanese and American Stock Markets*, 44 J. FIN. 849, 851 (1989).

<sup>19</sup> "A true international securities market will exist when participants are equally capable of dealing with both residents of other countries and residents of their own." Van Zandt, *supra* note 17, at 52.

While the global market is still developing, it is rapidly growing into an international securities market. One author suggests at least five contributing factors to internationalization.<sup>20</sup> The first is the volatility in exchange rates, which causes investors and issuers of securities to consider potentially profitable deals in foreign markets.<sup>21</sup> A second factor is interest rates that are relatively high, as compared with the past, that make investors look for the least expensive sources of money.<sup>22</sup> A third factor is the technological advances in the securities markets.<sup>23</sup> These advances provide for around-the-clock trading on the markets and make the great distances between markets less significant in terms of information gathering.<sup>24</sup> Fourth is the rise of large institutional investors, such as pension funds and insurance companies, which have access to a variety of other markets and investment opportunities.<sup>25</sup> The final factor is the general trend toward deregulation of the securities markets, which has been characterized in the American market by the relatively new rules<sup>26</sup> designed to assist foreign issuers of securities.<sup>27</sup>

Despite the development of the international securities market, significant regulation continues to be performed on a nation by nation basis. Each country manages the equity and debt securities markets within its domain, but not always in the same manner. For example, some governments choose to regulate by establishing a regulatory commission to oversee the market.<sup>28</sup> Other nations allow the market to regulate itself without imposing governmental oversight.<sup>29</sup> A third group establish a regulatory agency as well as a system of regulation by self-regulatory organizations (SROs).<sup>30</sup>

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<sup>20</sup> Richard A. Debs, *The Development of International Equity Markets*, 4 B.U. INT'L L.J. 5, 6-7 (1986).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 7.

<sup>23</sup> *Id.*

<sup>24</sup> TRADING AROUND THE CLOCK, *supra* note 4, at 1.

<sup>25</sup> Debs, *supra* note 20, at 7. In fact, the institutional investors have begun to dominate the exchange markets as individual investors make up a smaller percentage of the trading volume. DAVID L. RATNER & THOMAS L. HAZEN, *SECURITIES REGULATION: CASES AND MATERIALS* 3 (1991).

<sup>26</sup> See *infra* note 33.

<sup>27</sup> Debs, *supra* note 20, at 7. See also Van Zandt, *supra* note 17, at 60; Paul G. Mahoney, *Securities Regulations By Enforcement: An International Perspective*, 7 YALE J. ON REG. 305, 309 (1990) (noting that the highly regulated U.S. securities market has lost its competitive advantage to other countries with less restrictive regulations).

<sup>28</sup> France is an example of a country that utilizes government regulation alone. DAVID E. AYLING, *THE INTERNATIONALISATION OF STOCKMARKETS: THE TREND TOWARD GREATER FOREIGN BORROWING AND INVESTMENT* 119 (1986).

<sup>29</sup> *Id.* at 117-18 (referring to the United Kingdom). See Roberta S. Karmel, *Regulatory Aspects of Securities Trading*, 4 B.U. INT'L L.J. 105, 108 (1986).

<sup>30</sup> The United States utilizes such a system where the United States Securities and Exchange Commission (SEC) has general oversight powers, but the eight registered securities exchanges (the New York Stock Exchange being the largest) also share in regulation responsibilities as self-regulatory organizations (SROs). The SEC can delegate a portion of its power according to the Securities Act of 1933. Securities Exchange Act § 4A(a), 15 U.S.C. § 78d-

As a result of these three systems of regulation, the ability of corporations to raise capital in foreign countries becomes a complicated, risky, and costly venture.<sup>31</sup> At times, this process is made more difficult by barriers raised by government regulators, as well as other financial institutions, like SROs.<sup>32</sup> In this climate, it is not only the service providers who suffer, regulators are also faced with managing the growing markets with laws that frequently do not accommodate international financial services.<sup>33</sup>

However, the prospect of raising capital or making a profit more easily from another market speeds the development of the expanding global financial system. Since these changes in technology and the private markets move faster than the governments of the world are able to respond, there is a continual need for nations to react to and accommodate the market. Therefore, it becomes imperative that the problems be identified and addressed.

### B. A Troubled Global Securities Market

Although there is now a vast global securities market,<sup>34</sup> there are no corresponding global securities market regulations,<sup>35</sup> nor is there a global securities market regulator.<sup>36</sup> This problem is easier to approach when broken down into "sub-problems." Some of these sub-

1(a) (1988). See William J. Hicks, *Securities Regulation: Challenges in the Decade Ahead*, 68 IND. L.J. 791, 792 (1993). See also Roberta S. Karmel, *Blue Sky Merit Regulation: Benefit to Investors or Burden on Commerce*, 53 BROOK. L. REV. 105, 113 (1987) (exchanges are able to enforce various regulatory requirements on public companies through listing agreements). Finland, Germany and Switzerland also use this type of regulatory system. TRADING AROUND THE CLOCK, *supra* note 4, at 74.

<sup>31</sup> Paul M. Cushing, Note, *Multinational Securities Offerings*, 20 VAND. J. TRANS'L L. 81, 111 (1987).

<sup>32</sup> Among the most notorious of the countries that impose barriers through government and financial institutions is Japan. Van Zandt, *supra* note 17, at 70. See TRADING AROUND THE CLOCK, *supra* note 4, at 28-29. Other nations with a history of raising barriers to the entry of United States brokers are Canada, Switzerland, and Great Britain. Lee B. Spencer, Jr., *The Reaction of the Securities and Exchange Commission to the Internationalization of the Securities Markets: Three Concepts Releases*, 4 B.U. INT'L L.J. 111, 112 (1986).

<sup>33</sup> In the last ten years, the SEC and Congress have made some issues easier to accomplish in the U.S. stock market. For example, Rule 144A, 17 C.F.R. § 230.144A (1994), has made placement of restricted securities with "qualified institutional buyers" exempt from Section 5 registration of the Securities Act of 1933 § 5, 15 U.S.C. § 77e (1988). In addition, in 1990 Regulation S, 17 C.F.R. § 230.901-904 (1994), was added, which exempts an issuer of securities from Section 5 registration provided the issue is not available to the U.S. markets.

<sup>34</sup> Cross-border offerings of equity-related securities grew from \$200 million in 1983 to \$20.3 billion in 1987. Bond offerings increased from \$38 billion in 1980 to \$238 billion in 1988. In addition, investment in foreign securities around the world rose from \$250 billion in 1984 to \$1.281 trillion in 1987. TRADING AROUND THE CLOCK, *supra* note 4, at 29-30. See *supra* note 2 and accompanying text.

<sup>35</sup> There have, however, been a series of Memoranda of Understanding (MOUs) created between regulatory and oversight agencies of various nations concerning mutual assistance in enforcement matters. Millsbaugh, *supra* note 1, at 363.

<sup>36</sup> TRADING AROUND THE CLOCK, *supra* note 4, at 71. See Karmel, *supra* note 29, at 106 (noting that the lack of a worldwide regulatory authority is "[p]robably the most important barrier to any system of international regulation of the securities markets").



problems are barriers raised by governments to hinder foreign financial institutions, and investors, access to their markets,<sup>37</sup> while others are unofficial restrictions permitted by governments and employed by exchanges that are meant to exclude membership of foreign financial institutions.<sup>38</sup> These problems are addressed in the GATS by promoting agreements to lower these barriers and by specific commitments that require national treatment of foreign services and service providers.<sup>39</sup>

The GATS will address other obstacles to harmonization that are incidental to internationalization. For example, additional problems can arise in the form of government regulations concerning clearing and settlement of securities,<sup>40</sup> disclosure of information laws,<sup>41</sup> and capital requirements for securities firms.<sup>42</sup> The fact that these regulations are referred to as "problems" or impediments to a global securities market, though, does not mean that the GATS would eradicate them completely.

Unlike a country's tariff and nontariff trade barriers created to protect particular goods of a domestic market and for which the GATT was designed to address,<sup>43</sup> national securities regulations, for the most part, are not meant to limit or exclude foreign corporations from entering a market, nor are they generally designed with the intent to

<sup>37</sup> *Id.* at 109. See Van Zandt, *supra* note 17, at 70.

<sup>38</sup> TRADING AROUND THE CLOCK, *supra* note 4, at 28.

<sup>39</sup> Article XVII(1) of the GATS requires national treatment to be accorded to all Members. It states that "[i]n the sectors inscribed in its schedule . . . each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than it accords to its own like services and service suppliers." GATS, *supra* note 6, art. XVII, para. 1, at 60-61.

<sup>40</sup> *Id.*, Annex on Financial Services, para. 5.1(n), at 72.

<sup>41</sup> *Id.*, Annex on Financial Services, para. 5.1(o), at 72.

<sup>42</sup> Application of the GATS to other impediments to harmonization, such as penalties for violation of securities laws, real time information supply, means of enforcement mechanisms (criminal or civil), self-regulation versus government regulation, and various trading systems (such as over-the-counter trading and unitary exchange specialist) may or may not be addressable within the GATS framework. See Karmel, *supra* note 29, at 107-09. The GATS would act to counter regulations designed to inhibit financial service suppliers from entering a nation's markets; however, the objectives of the GATS are restrained through Article XIV. It reads in part:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

. . . .  
(c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:  
(i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on service contracts . . . .

GATS, *supra* note 6, art. XIV, at 57-58. Article XIV leaves members room to argue that particular methods of regulation exist to insure the integrity of the market and safeguard faith in the system.

<sup>43</sup> TRADING AROUND THE CLOCK, *supra* note 4, at 9.

keep out foreign financial service providers.<sup>44</sup> The goals of these regulations vary; but principally, they are designed to protect the investor and the financial system as a whole and to encourage an efficient system.<sup>45</sup> Therefore, the purpose of the GATS, as it relates to the global securities market, is to harmonize regulations where possible and to eliminate regulations that act as barriers to financial services, but that do not play an integral role in protection of the investor or the system.<sup>46</sup>

### C. Other Approaches at Addressing the Problems

Other organizations in the last thirty years have attempted, with some limited amount of success, to move global markets in the direction of harmonization. The International Organization of Securities Commissions (IOSCO), which is one of the largest international organizations and is made up of some eighty securities commissions, national banks, and exchanges,<sup>47</sup> has studied several facets of the global securities market. Generally it has tried to foster cooperation between nations concerning surveillance and enforcement,<sup>48</sup> and to harmonize

<sup>44</sup> This is not to say that there are no such statutes. Government regulations designed to "protect domestic investors by limiting foreign issuer access" remain a significant problem in less developed nations, and to a smaller extent remain a concern in the developed countries of the world as well. Van Zandt, *supra* note 17, at 70. See *TRADING AROUND THE CLOCK*, *supra* note 4, at 72.

<sup>45</sup> For example, the Securities Act of 1933 states:

[i]t is the declared policy of this subsection that there should be greater Federal and State cooperation in securities matters, including—(A) maximum effectiveness of regulation, . . . (C) minimum interference with the business of capital formation, [and] (D) a substantial reduction in costs and paperwork to diminish the burdens of raising investment capital . . .

Securities Act of 1933 § 19(C)(2), 15 U.S.C. § 77s(c)(2) (1988). The SEC is probably the most zealous advocate of this model. According to James R. Doty, then General Counsel of the SEC, "[t]he Commission was created by Congress to help ensure that United States markets are fair and efficient and that United States investors are treated fairly." James R. Doty, *The Role of the Securities and Exchange Commission in an Internationalized Marketplace*, 60 *FORDHAM L. REV.* S77, S78 (1992).

<sup>46</sup> In the Annex on Financial Services, paragraph 2.1 states:

[n]otwithstanding any other provisions of the Agreement, a Member shall not be prevented from taking measures for prudential reasons, including for the protection of investors . . . or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system.

GATS, *supra* note 6, Annex on Financial Services, para. 2.1, at 70. It would therefore appear that this goal of securities regulation is accounted for in the GATS through the Annex. However, paragraph 2.1 does go on to state that when the measures taken do not conform to the Agreement, they shall not be used as a pretense for avoiding the obligations of the GATS or commitments made to other Members. *Id.* An inference that might be drawn from paragraph 2.1 is that the Annex does not hold out much chance for the creation of a singular global securities market or regulator, because the language of paragraph 2.1 permits each Member to protect its investors and financial system. This would run contrary to the creation of a unified system. This seems to match the generally held sentiment that one global regulator and market is not feasible, at least not presently. Van Zandt, *supra* note 17, at 79-81.

<sup>47</sup> INTERNATIONAL ORGANIZATION OF SECURITIES COMMISSIONS, ANNUAL REPORT 23-27 (1990).

<sup>48</sup> Millspaugh, *supra* note 1, at 365.

the securities laws.<sup>49</sup> At times, however, IOSCO efforts have reached inconclusive results,<sup>50</sup> and it has not arrived at a specific course of action to implement the findings of its studies. Also, IOSCO has not demonstrated a desire to become a leader in this area, since it has not presented itself as a candidate to become the first "global securities market watchdog."<sup>51</sup>

A second organization, the Federation Internationale des Bourses de Valeurs (FIBV or International Federation of Stock Exchanges), is composed of over forty securities exchanges.<sup>52</sup> The aim of the FIBV has been generally to facilitate the exchange of information,<sup>53</sup> and more recently, to study international regulation and the role of the securities exchanges.<sup>54</sup> However, the FIBV has made little progress on its stated concerns of global securities regulation.<sup>55</sup> In part, this is due to FIBV's membership consisting entirely of securities exchanges, which gives it a bias toward as much self-regulation as possible by the exchanges.<sup>56</sup> Two problems with the FIBV as a leader toward harmonization arises from the composition of the organization's membership. The FIBV does not appear to act with the objectivity necessary to catalyze improvement in the global market, and secondly, it lacks the respectability that comes with government cooperation and involvement.<sup>57</sup>

Due to the problems confronted by these other organizations, this Article suggests that the GATS be considered as a means to pull the governments of the world toward a harmonized global securities market. The GATS will provide a forum where the governments of the world can meet and implement agreements to correct the above mentioned problems that plague the global securities markets. In addition, the GATS is founded on the principles of "transparency and progressive liberalization" that encourage Members to promptly disclose regulations impacting on the GATS Agreement and to work together to

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<sup>49</sup> TRADING AROUND THE CLOCK, *supra* note 4, at 76.

<sup>50</sup> "The 1989 annual conference of the International Organization of Securities Commissions (IOSCO), an institution formed to further international cooperation, was marked by the reluctance of participants to 'alter[ ] key aspects of their regulatory schemes.'" Mahoney, *supra* note 27, at 313 n.38 (citing *Harmony and Wariness Coexist at IOSCO's Conference in Venice*, 2 Int'l Sec. Reg. Rep. (BNA) No. 20, at 1 (Sept. 27, 1989)).

<sup>51</sup> Millspaugh, *supra* note 1, at 370-71.

<sup>52</sup> *Id.* at 367.

<sup>53</sup> TRADING AROUND THE CLOCK, *supra* note 4, at 77.

<sup>54</sup> INTERNATIONAL FEDERATION OF STOCK EXCHANGES, ANNUAL REPORT 15 (1990).

<sup>55</sup> One study done by the Federation Internationale des Bourses de Valeurs (FIBV or International Federation of Stock Exchanges) concluded that a supranational regulatory body was probably not feasible, as costs and the variety of world security regulations would inhibit it. However, it did suggest that bilateral agreements for cooperation among government regulators could begin the process. *Id.* at 16.

<sup>56</sup> See Millspaugh, *supra* note 1, at 367-68, 374.

<sup>57</sup> *Id.* at 374.

achieve less burdensome regulatory schemes.<sup>58</sup> Finally, the GATS allows for cooperation with organizations such as IOSCO and the FIBV in Article VII(5).<sup>59</sup> For these reasons, the GATS is the best suited agreement to accommodate a harmonized global securities market.

### III. How the GATS Reaches Financial Services

#### A. Building the GATS Framework

In 1983, it was proposed that contracting parties to the GATT, with an interest in enlarging the Agreement to include services, conduct national examinations of issues in the services sector.<sup>60</sup> At the beginning of 1987, a Group of Negotiations on Services (GNS) had been established and using the results of the national examinations, decided upon five key elements needed to arrive at a services agreement.<sup>61</sup> The five elements were a definition of services as well as statistical matters,<sup>62</sup> broad principles and rules that the agreement would be based upon,<sup>63</sup> the coverage of the multilateral framework,<sup>64</sup> the already existing international arrangements on services,<sup>65</sup> and finally the measures then existing that assisted or hindered the expansion of trade in services.<sup>66</sup> By the end of 1991, the drafters had created the GATS, which relied upon the following three "pillars": basic obliga-

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<sup>58</sup> GATS, *supra* note 6, pmb., at 48. "Transparency" is set out in Article III of the GATS. It holds:

1. Each Member shall publish promptly and, except in emergency situations, at the least by the time of their entry into force, all relevant measures of general application, which pertain to or affect the operation of this Agreement. . . .

4. Each Member shall respond promptly to all requests for specific information, by any other Member, on any of its measures of general application or international agreements within the meaning of paragraph 1.

*Id.*, art. III, at 49-50. See *infra* notes 106-11 and accompanying text.

<sup>59</sup> Article VII(5) states, "[i]n appropriate cases, Members shall work in co-operation with relevant intergovernmental and non-governmental organizations towards the establishment and adoption of common international standards and criteria for recognition and common international standards for the practice of relevant services trades and professions." GATS, *supra* note 6, art. VII, para. 5, at 54.

<sup>60</sup> GATT ACTIVITIES IN 1983 at 13, Sales No. GATT/1984-2 (1984).

<sup>61</sup> GATT ACTIVITIES 1987: AN ANNUAL REVIEW OF THE WORK OF THE GATT at 47, Sales No. GATT/1988-2 (1988).

<sup>62</sup> Generally, the discussions were whether the definition of services included services that had to cross a border to be completed or required the consumer to cross a border, or whether it would only be the cross-border sales of services. *Id.* at 47-48.

<sup>63</sup> These talks centered upon the question of whether the services agreement should contain notions of national treatment, most-favoured-nation treatment, transparency, and non-discrimination. Several of the developing countries questioned whether these standards would fully protect their interests in promoting economic growth. *Id.* at 48.

<sup>64</sup> The Group of Negotiations on Services (GNS) studied whether all services would be covered by the agreement, or only those that were labor-intensive or labor services. *Id.* at 49.

<sup>65</sup> The point of these discussions was to decide whether existing agreements adequately addressed trade in those services with which they dealt (such as the International Civil Aviation Organization), and whether they promoted trade by the developing countries. *Id.*

<sup>66</sup> The GNS was concerned with how transparency and progressive liberalization might be applied to then existing measures of nations. *Id.*

tions of all the accepting parties, national schedules of commitments subject to liberalization which would expand national obligations, and a series of service annexes.<sup>67</sup>

Structurally, the GATS is broken up into six Parts, which comprise thirty-two Articles. Article I(1) of the GATS states, "[t]his Agreement applies to measures by Members affecting trade in services."<sup>68</sup> To understand the scope of the GATS, the term "measure" must be defined. According to Article I(3)(a)(i)-(ii), "measures by Members" are "measures taken by central, regional or local government and authorities; and non-governmental bodies in the exercise of powers delegated to them by the central, regional or local governments or authorities, which implicate obligations and commitments under the Agreement."<sup>69</sup>

There are, however, two side issues concerning the definition of "measures" that need to be mentioned. First, it is worth re-emphasizing that the GATS applies not only to the acts of a nation that affect trade in services, but it also applies to those of the regional or local governmental units.<sup>70</sup> Therefore the GATS conceivably will apply, in the United States, to the state "blue sky" laws<sup>71</sup> as well as the federal securities laws.<sup>72</sup> In addition, it is important to recognize that the activities of the SROs, like the regional and local governments, are caught within the scope of the GATS by the second clause of the definition of "measures."<sup>73</sup> The SROs meet the description of a non-governmental

<sup>67</sup> GATT ACTIVITIES 1991: AN ANNUAL REVIEW OF THE WORK OF THE GATT at 39, Sales No. GATT/1992-2 (1992).

<sup>68</sup> GATS, *supra* note 6, art. I, para. 1, at 48.

<sup>69</sup> *Id.*, art. I, para. 3(a)(i)-(ii), at 49.

<sup>70</sup> See *supra* note 69 and accompanying text.

<sup>71</sup> Prior to the adoption of the first federal securities laws in 1933, almost all of the states had enacted securities regulations in order to protect investors from fraudulent activities in the securities markets. These laws were termed "blue sky" laws because it was said that without the laws securities promoters would attempt to sell "building lots in the blue sky in fee simple." Brian J. Fahrney, *State Blue Sky Laws: A Stronger Case for Federal Pre-emption Due to Increasing Internationalization of the Securities Markets*, 86 NW. U. L. REV. 753, 755 (1992).

<sup>72</sup> Not only do the "blue sky" laws of the states seem caught in the definition of "measure" in Article I(1), but also, and of potentially more significance to the United States, is the last clause of Article I(3)(a). It states that, "[i]n fulfilling its obligations and commitments under the Agreement, each Member shall take such reasonable measures as may be available to it to ensure their observance by regional and local governments and authorities and non-governmental bodies within its territory." GATS, *supra* note 6, art. I, para. 3(a), at 49. This could have a significant impact on the "blue sky" regulations of the states, which according to the language of this clause would be required to follow the obligations of the federal government under the GATS, and if necessary be preempted by federal law (if it were considered a "reasonable" measure to take on the part of the federal government). Many scholars have argued persuasively on both sides of the debate over preemption of the state "blue sky" laws, but there is little doubt that in order to facilitate a global securities market the regulations of the several states must be harmonized or preempted. Karmel, *supra* note 29, at 120-21; see Fahrney, *supra* note 71, at 775. But cf. Manning G. Warren III, *Striking the Right Balance: Federal and State Regulation of Financial Institutions: The Role of Merit Regulation*, 53 BROOK. L. REV. 129 (1987) (arguing that state "blue sky" laws fill the gaps created by the federal securities laws concentration on disclosure).

<sup>73</sup> See *supra* note 69 and accompanying text.

body exercising powers delegated by the government.<sup>74</sup>

### B. *The GATS and Financial Services*

The obligations of the Members to the Agreement concerning financial services are first referenced in Article XXIX of the GATS, which introduces the Annexes that are applied through the GATS Agreement.<sup>75</sup> The Annexes deal with specific areas of services, such as the Annex on Financial Services. In the financial services field, the drafters addressed three broad matters of concern: commercial banking services, insurance services, and investment banking services.<sup>76</sup> This article is concerned with the last, as it is traditionally related to services such as giving advice to investing clients, underwriting, investment management, dealing and brokerage services provided in the securities markets.<sup>77</sup> It must be remembered, however, that the three areas are interrelated. Therefore, it is appropriate to keep in mind that changes to one of the three areas could have an impact upon the other two.<sup>78</sup>

The Annex on Financial Services (Annex) begins at paragraph 1.1, which states, "[t]his annex applies to measures affecting the supply of financial services."<sup>79</sup> Since "measures" have been defined above, the next definition required is for the "supply of financial services."<sup>80</sup> These four words, however, envelop both the scope of the Annex and the activities regarded as being financial services. To understand the scope of the Annex, it is necessary to turn to paragraph 1.1, which states "[r]eference to the supply of a financial service in the Annex shall mean the supply of a service as defined in paragraph 2 of Article I of the Agreement."<sup>81</sup>

Therefore, Article I(2) provides the scope of the Annex (and of course the GATS). It states:

trade in services is defined as the supply of a service: (a) from the territory of one Member into the territory of any other Member; (b) in the territory of one Member to the service consumer of any other Member; (c) by a service supplier of one Member, through commercial presence in the territory of any other Member; (d) by a service

<sup>74</sup> See Securities Act of 1933 § 19(a), 15 U.S.C. § 77s(a) (1988).

<sup>75</sup> GATS, *supra* note 6, art. XXIX, at 67.

<sup>76</sup> U.N. CENTRE ON TRANSNATIONAL CORPORATIONS, TRANSNATIONAL CORPORATIONS, SERVICES AND THE URUGUAY ROUND, at 111, U.N. Doc. ST/CTC/103, U.N. Sales No. E.90.II.A.11 (1990).

<sup>77</sup> *Id.* at 113.

<sup>78</sup> This is especially true in every industrialized nation, other than the United States, where commercial banking is involved significantly in the securities markets. See Cynthia C. Lichtenstein, *U.S. Restructuring Legislation: Revising the International Banking Act of 1978, For the Worse?*, 60 FORDHAM L. REV. S37, S48 n.39 (1992). See generally Trachtman, *supra* note 12, at 255 (discussing the adoption by the European Community of the Second Banking Directive which allows for commercial bank involvement in the financial services market).

<sup>79</sup> GATS, *supra* note 6, Annex on Financial Services, para. 1.1, at 71.

<sup>80</sup> See *supra* note 69 and accompanying text.

<sup>81</sup> GATS, *supra* note 6, Annex on Financial Services, para. 1.1, at 71.

supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.<sup>82</sup>

The definition establishes that almost all activities involving transnational transactions and are financial services fall within the bounds of the Annex.

There are two manners in which financial services are described by the Annex. The first is paragraph 5.1, wherein the Annex provides some examples of financial services. It states:

[a] financial service is any service of a financial nature offered by a financial service supplier of a Member. . . . Financial services include the following activities: . . . (j) [t]rading for own account or for account of customers, whether on an exchange, in an over-the-counter market or otherwise, the following . . . (iii) derivative products including, but not limited to, futures and options; . . . (v) transferable securities; . . . (k) [p]articipation in issues of all kinds of securities, including underwriting and placement as agent (whether publicly or privately) and provision of services related to such issues; . . . (n) [s]ettlement and clearing services for financial assets, including securities, derivative products, and other negotiable instruments.<sup>83</sup>

The second approach is to state what financial services are not. Article I(3)(b) explains that services do not include any service supplied in the exercise of governmental authority.<sup>84</sup> A broker who trades on a domestic exchange for a foreign customer who holds shares in a domestic corporation is an example of the scope and subject matter of the Annex. The buying and selling of equity or debt instruments on the exchange, for a commission, is providing a financial service within the Annex under paragraph 5.1(j)(iii).<sup>85</sup> The trader providing services in his country to a customer residing in a different Member nation is an activity that falls within the scope of the GATS, Article I(2)(b).<sup>86</sup> It is clear from the language of the GATS, Article I, and the Annex, paragraphs 1.1 and 5.1 that the creators of the Agreement wanted to reach the supply of financial services on the exchange markets and the over-the-counter markets (OTC) of the Member nations.

#### IV. Why the GATS Holds Promise for Harmonization

Three areas of the GATS hold promise for harmonization of the securities markets. The first opportunity is in the Annex on Financial

<sup>82</sup> *Id.*, art. I, para. 2(a)-(d), at 48.

<sup>83</sup> *Id.*, Annex on Financial Services, para. 5.1, at 71-72.

<sup>84</sup> *Id.*, art. I, para. 3(b), at 49. Paragraph 1.2 of the Annex states that:

[f]or the purposes of paragraph 3(b) of Article I . . . 'services supplied in the exercise of governmental authority' means . . . (1) activities conducted by a central bank or monetary authority or by any other public entity in pursuit of monetary or exchange rate policies; (2) activities forming part of a statutory system of social security or public retirement plans; (3) other activities conducted by a public entity for the account or with the guarantee or using the financial resources of the Government.

*Id.*, Annex on Financial Services, paras. 1.2.1 to 1.2.3, at 70.

<sup>85</sup> *Id.*, Annex on Financial Services, para. 5.1(j)(iii), at 72.

<sup>86</sup> *Id.*, art. I, para. 2(b), at 48.

Services, specifically paragraph 3.2,<sup>87</sup> which requires Member countries that have entered into an agreement or arrangement to provide an opportunity to other Members that wish to join the agreement.<sup>88</sup> The second is contained in Part IV of the GATS labeled "Progressive Liberalization," and specifically, can be found in Article XIX.<sup>89</sup> This Article directs Member nations to begin a series of negotiations to liberalize laws that regulate trade in services, in an effort to reduce and eliminate obstructionist law.<sup>90</sup> The last is the dispute settlement system, newly revised at the recently completed Uruguay Round, which is built into the GATS system through Articles XXII and XXIII.<sup>91</sup> This system will provide Member nations with a place to hold formal dispute settlement proceedings concerning the agreements reached among the Members through the GATS process. The blessings of this system are that it arrives at a definitive answer and provides for relief while holding the entire process to a mandated amount of time.<sup>92</sup> These three provisions in the GATS will be discussed in turn below.

#### A. *Harmonization Through the Annex Paragraph 3.2*

Paragraph 3.2 provides a method to give GATS Members the opportunity to join existing agreements between other GATS Members or to start negotiations to create similar agreements. In order to demonstrate how paragraph 3.2 could work and its potential usefulness, it is helpful to refer to an agreement now in existence as a hypothetical model. The Multijurisdictional Disclosure System (MJDS)<sup>93</sup> will be used as a model to demonstrate the manner in which paragraph 3.2 would work and to show how it could encourage harmonization of the global securities markets. The MJDS seems appropriate as a model because it contemplates extending to other countries the opportunity to enter similar bilateral agreements in an attempt to move toward future harmonization.<sup>94</sup>

As background to the MJDS agreement, recall what generally oc-

<sup>87</sup> *Id.*, Annex on Financial Services, para. 3.2, at 71.

<sup>88</sup> See *infra* notes 93-105 and accompanying text.

<sup>89</sup> GATS, *supra* note 6, art. XIX, para. 1, at 67.

<sup>90</sup> See *infra* notes 106-111 and accompanying text.

<sup>91</sup> GATS, *supra* note 6, art. XXII, paras. 1-2, at 63; *Id.*, art. XXIII, paras. 1-3, at 63-64.

<sup>92</sup> See *infra* notes 112-29 and accompanying text.

<sup>93</sup> The MJDS permits Canadian issuers meeting eligibility criteria "to satisfy SEC securities registration and reporting requirements by providing disclosure documents prepared in accordance with the requirements of Canadian securities regulators." MJDS, *supra* note 3, at 81,860. The MJDS also allows certain "cash tender and exchange offers for securities of Canadian issuers to proceed in accord with Canadian tender offer requirements instead of in accordance with SEC tender offer regulation." *Id.* The Canadian Securities Administrators adopted a largely parallel MJDS system in Canada. *Id.* at 81,881.

<sup>94</sup> The MJDS states:

[w]hile Canada is the partner of the United States in this inaugural multijurisdictional disclosure initiative, the MJDS is designed with the intention of mitigating on a broader scale the difficulties posed by multinational offerings. Thus, the Commission is continuing its work with securities regulators of other



curs in the issue of a corporation's stock. In the most simple of explanations, a corporation, the "issuer," seeks out an underwriter to issue the corporation's securities. By building an underwriting syndicate, the lead underwriter will arrange for the marketing of the securities to private investors or to the general public. This underwriting syndicate is normally made up of securities firms who pass the new issue on to a "selling group" of dealers, who then sell the securities to the customer or to other dealers.<sup>95</sup> Nearly the entire system of marketing the securities entails services being provided by service suppliers, and in fact, is defined as a "financial service" in the GATS Annex on Financial Services.<sup>96</sup>

The MJDS was created to assist financial service providers engaged in this enterprise to complete an issue of securities in Canada and the United States. It is a reciprocal approach to harmonization, in contrast to a common prospectus approach.<sup>97</sup> The reciprocal approach permits an issuer of securities to complete an issue in countries party to the agreement using the regulatory format of its home country.<sup>98</sup>

Therefore, under the MJDS certain Canadian issuers may prepare an issue, publicize, and offer securities in the United States securities markets applying Canadian laws and reviewed by Canadian securities regulators.<sup>99</sup> A parallel agreement allows United States issuers in the Canadian market to comply with the securities laws of the United States when effecting issues in Canada.<sup>100</sup> The agreement has significant ramifications for the Canadian and United States corporations and service suppliers qualified to utilize the MJDS because the service suppliers no longer have to endure many of the costs involved in complying with the laws of two countries.<sup>101</sup> Overall, the system moves the

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countries with a view toward extending the multijurisdictional disclosure system.

*Id.* at 81,862.

<sup>95</sup> RATNER & HAZEN, *supra* note 25, at 25-27.

<sup>96</sup> GATS, *supra* note 6, Annex on Financial Services, para. 5.1(k), at 72.

<sup>97</sup> The common prospectus approach would be an agreement by several countries to set out a uniform prospectus document that all of the members would accept. The document would establish the necessary information that needed to be released by an issuer in order to complete an issue of securities in any of the member countries. This would vastly simplify the work of financial service providers working in the securities markets as they would no longer have to account for the regulations of multiple countries. The trouble is that even bringing together the countries with major markets to agree on a common prospectus is unlikely for the near future. Cushing, *supra* note 31, at 113-15.

<sup>98</sup> *Id.* at 115-17.

<sup>99</sup> The release states that: "Canadian issuers that meet specified eligibility tests may register securities with the Commission through disclosure documents they have prepared for Canadian regulatory authorities. In addition, specified Canadian issuers may use Canadian disclosure documents to satisfy the Commission's periodic disclosure [requirements] and tender offer regulations." MJDS, *supra* note 3, at 81,861.

<sup>100</sup> See generally *id.* at 81,974-82,001 (describing the Canadian system for disclosure within the MJDS framework).

<sup>101</sup> This may include in certain offerings not having to format the accounting system of a Canadian corporation to meet with the demands of U.S. Generally Accepted Accounting

United States regulatory system into some degree of harmonization with the Canadian system even though the laws of neither country have been substantively changed.

The MJDS exemplifies how paragraph 3.1 of the Annex, under heading 3, entitled "Recognition," should work. The text of paragraph 3.1 reads:

[a] Member may recognize prudential measures of any other country in determining how the Member's measures relating to financial services shall be applied. Such recognition, which may be achieved through harmonization or otherwise, may be based upon an agreement or arrangement with the country concerned or may be accorded autonomously.<sup>102</sup>

This is essentially what the United States and Canada have done.

The existence of the MJDS makes the use of paragraph 3.1 appear plausible; however, paragraph 3.1 does not provide anything that did not exist prior to the GATS. Countries could always enter into agreements like the MJDS. There is more in the GATS, however, that will encourage these agreements.

Paragraph 3.2 adds other interesting opportunities within the GATS framework. It states:

A Member that is a party to such an agreement or arrangement referred to in paragraph 3.1, whether future or existing, *shall afford* adequate opportunity for other interested Members to negotiate their accession to such agreements or arrangements, or to negotiate comparable ones with it, under circumstances in which there would be equivalent regulation, oversight, implementation of such regulation, and, if appropriate, procedures concerning the sharing of information between the parties to the agreement or arrangement. Where a Member accords recognition autonomously, it shall afford adequate opportunity for any other Member to demonstrate that such circumstances exist.<sup>103</sup>

It is clear from this paragraph that the GATS has been designed to create opportunities for harmonization of financial service regulations.<sup>104</sup> The GATS uses language requiring a Member to give another Member the opportunity to enter established agreements, to become Members to those that are not yet complete, or to negotiate comparable ones. In addition, where a Member would choose to give recogni-

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Principles which is truly a time-consuming and costly endeavor. See generally Richard M. Kosnik, *Comments on "Barriers to Foreign Issuer Entry into U.S. Markets,"* 24 LAW & POL'Y INT'L BUS. 1237, 1249 (1993) (describing the impact the MJDS will have upon the financial services provided between the United States and Canada).

<sup>102</sup> GATS, *supra* note 6, Annex on Financial Services, para. 3.1, at 71.

<sup>103</sup> *Id.*, Annex on Financial Services, para. 3.2, at 71 (emphasis added).

<sup>104</sup> Article VII of the GATS, also entitled "Recognition," holds similar opportunities for harmonization of the standards for authorization, licensing, or certification of service suppliers. Paragraph 1 states that a Member "may recognize" the qualifications granted in a particular country to practice as a service supplier. The more interesting paragraph is again 2, which states that "a Member that is party to an agreement or arrangement referred to in paragraph 1 shall afford adequate opportunity for other interested Members to negotiate their accession or negotiate a comparable agreement." *Id.*, art. VII, paras. 1-2, at 54.

tion to another of its own accord, other Members must be given the opportunity to demonstrate that they deserve equal treatment.

Paragraph 3.2 makes it clear that accession by a GATS Member to any such existing or future agreement would be on terms equivalent to those of the original agreement, in matters such as regulation and oversight. An obvious tripping stone appears to be that countries will not join agreements if it would require a change in their own regulations in order to meet demands of equivalent regulation or oversight in the original agreement. However, it does not seem incredible to believe that a state would adapt its regulations where the benefits outweigh the costs. In many instances the securities regulations of nations resemble one another enough that a Member's making adjustments to its regulations to reap the benefits of a particular agreement would be beneficial.<sup>105</sup> In addition, a Member wishing to enter particular agreements most likely would choose only those agreements that were amenable to their own system of regulation. Otherwise the costs of reforming their regulatory system in order to join would outweigh the benefits received.

The required opportunity a Member is given is the crux of paragraph 3.2. Although this provision does not demand acceptance of the Member that wishes to enter an agreement or be accorded the same treatment, it compels signatories to an agreement, at a minimum, to entertain those who desire to be members. The result would seem to hold the prospect of harmonization of the securities markets. States that enter into agreements which open doors to their markets, even if only bilateral agreements, create the possibility that other Members will try to open those doors wider.

#### *B. Progressive Liberalization—Article XIX*

Perhaps Article XIX holds the most promise for future harmonization of the global securities markets, located in Part IV of the GATS, entitled "Progressive Liberalization," Article XIX calls upon Members to:

enter into successive rounds of negotiations, beginning not later than five years from the date of entry into force of the Agreement Establishing the MTO [Multilateral Trade Organization] and periodically thereafter, with a view to achieving a progressively higher level of liberalization. Such negotiations shall be directed to the reduction or elimination of the adverse effects on trade in services of measures as a means of providing effective market access.<sup>106</sup>

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<sup>105</sup> This would seem to be the case in the creation of the MJDS between Canada and the United States. The fact that each country has similar standards for securities regulation and accounting, as well as the number of corporations from each country listing securities on the other's markets, makes the move toward a more harmonized system logical. See MJDS, *supra* note 3, at 81,862.

<sup>106</sup> GATS, *supra* note 6, art. XIX, para. 1, at 61.

Article XIX seems particularly important in terms of harmonization<sup>107</sup> of the global securities markets because there are currently no organizations able to orchestrate a cast of members capable of changing the system of securities regulations. Article XIX would require that the Members of the GATS meet to improve upon the present system of service regulation on a regular basis.<sup>108</sup> This improvement is so important to the GATS framework that the idea is a part of the Preamble to the Agreement.<sup>109</sup>

A criticism of Article XIX is that the negotiations to be entered into could take as long as five years after the establishment of the MTO.<sup>110</sup> The response is to emphasize the importance of beginning the negotiations, and the GATS would mandate that the Members of the GATS at least begin. Besides, there are few, if any, commentators who believe that harmonization of the securities markets will occur in the next five years.<sup>111</sup> Finally, the countries of the world cannot continue to avoid this problem.

### C. *The Dispute Settlement Approach*

The MTN dispute settlement system (DSS), incorporated into the GATS through Article XXIII, is the final reason this Article proposes the GATS as a method of achieving harmonization.<sup>112</sup> The DSS estab-

<sup>107</sup> "Liberalization" almost necessitates harmonization in the area of financial services because Article XIX states that the "negotiations shall be directed to the reduction or elimination of the adverse effects on trade in services of measures as a means of providing effective market access." *Id.* There is no way to arrive at this goal in the financial services arena without harmonization of the laws. See *supra* notes 28-46 and accompanying text.

<sup>108</sup> For a current list of GATS members, see *supra* note 6.

<sup>109</sup> The Preamble to the GATS reads in part, "*Desiring* the early achievement of progressively higher levels of liberalization of trade in services through successive rounds of multilateral negotiations aimed at promoting the interests of all participants . . ." GATS, *supra* note 6, pmbl., at 48.

<sup>110</sup> "Members shall enter into successive rounds of negotiations, beginning not later than five years from the date of entry into force of the Agreement Establishing the MTO . . ." *Id.*, art. XIX, para. 1, at 61.

<sup>111</sup> Cushing, *supra* note 31, at 122.

<sup>112</sup> The text of Article XXIII of the GATS reads as follows:

1. If any Member should consider that any other Member fails to carry out its obligations or specific commitments under this Agreement, it may with a view to reaching a mutually satisfactory resolution of the matter, have recourse to the Understanding on Rules and Procedures Governing the Settlement of Disputes.

2. If the DSB [Dispute Settlement Body] considers that the circumstances are serious enough to justify such action, it may authorize a Member or Members to suspend the application to any other Member or Members of such obligations and specific commitments in accordance with Section 22 (Compensation and the Suspension of Concessions) of the Understanding on Rules and Procedures Governing the Settlement of Disputes.

3. If any Member considers that any benefit it could reasonably have expected to accrue to it under a specific commitment of another Member under Part III of this Agreement is being nullified or impaired as a result of the application of any measure which does not conflict with the provisions of this Agreement, it may have recourse to the Understanding on Rules and Procedures Governing the Settlement of Disputes. If the measure is determined by the

lishes a dispute settlement mechanism that can be utilized when one Member claims that a benefit accruing to it under the GATS has been "nullified or impaired" (or even when a reasonable expectation arising from the agreement is "nullified or impaired"), because another Member to the Agreement is not fulfilling its obligations.<sup>113</sup> The DSS acts as a tool of harmonization because it may be used as a tool for renegotiation before agreements can deteriorate.<sup>114</sup>

The DSS, however, is not the first approach to solving the disagreements of the Members. Article XXII(1) of the GATS calls each Member to "accord sympathetic consideration" to the complaints raised by other Members.<sup>115</sup> This requires that the complaining Member be given an adequate opportunity to enter into consultations regarding the complaint with the other Member.<sup>116</sup> If the consultations should prove unsuccessful within sixty days, the Member seeking consultations may request the establishment of a dispute settlement panel.<sup>117</sup>

Such a panel, if the complaining party requests it, is almost guaranteed to be established at the current meeting of the Dispute Settlement Body (DSB) or at the meeting following the request.<sup>118</sup> The

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DSB to have nullified or impaired such a benefit, the Member affected shall be entitled to a mutually satisfactory adjustment on the basis of paragraph 2 of Article XXI, which may include the modification or withdrawal of the measure. In the event an agreement cannot be reached between the Members concerned, Section 22 (Compensation and the Suspension of Concessions) of the Understanding on Rules and Procedures Governing the Settlement of Disputes shall apply.

GATS, *supra* note 6, art. XXIII, paras. 1-3, at 634-64.

<sup>113</sup> *Id.*, art. XXIII, para. 3, at 64.

<sup>114</sup> With respect to GATT Article XXIII, one commentator has stated that the drafters wanted a procedure for adjudicating disputes concerning violations of the Agreement as well as a type of "mandatory renegotiation procedure for settling more general grievances" to balance concessions and repair damaged interests. William J. Davey, *Dispute Settlement in GATT*, 11 FORDHAM INT'L L.J. 51, 56-57 (1987). Because the GATT and GATS articles on dispute settlement are so similar both in written style, and in the fact that they use the identical dispute settlement procedure, the idea of a mandatory renegotiation procedure would seem to apply equally to the GATS as it does to the GATT.

<sup>115</sup> GATS, *supra* note 6, art. XXII, para. 1, at 63.

<sup>116</sup> The DSU requires that consultations be afforded to the complaining party in paragraph 4.3. It reads:

If a request for consultations is made pursuant to a covered agreement, the Member to which the request is made shall, unless otherwise mutually agreed, reply to the request within ten days after its receipt and shall enter into consultations in good faith within a period of no more than thirty days from the date of the request, with a view to reaching a mutually satisfactory solution. If the Member does not respond within ten days, or does not enter into consultations within a period of no more than thirty days, or a period otherwise mutually agreed, from the date of the request, then the Member that requested the holding of consultations may proceed directly to request the establishment of a panel.

DSU, *supra* note 9, para. 4.3, at 116.

<sup>117</sup> *Id.*, para. 4.7, at 117.

<sup>118</sup> *Id.*, para. 6.1, at 118. The DSB is established pursuant to the Agreement Establishing the MTO in order to "establish panels, adopt panel and Appellate Body reports, maintain

panel has a schedule that will be generally followed<sup>119</sup> in hearing the dispute between the parties and should last no more than six months.<sup>120</sup> In no event is the length of the total proceedings from the time of the panel's commission to the rendering of a decision to be more than nine months.<sup>121</sup> The decision of the panel, if not appealed, is adopted by the DSB within sixty days of its rendering.<sup>122</sup> If an appeal is taken from the decision, the procedure is to last no more than ninety days,<sup>123</sup> and it is effectively the final decision on the dispute.<sup>124</sup> In all, a panel report with an appeal should not last longer than one year.<sup>125</sup>

This process demonstrates that the GATS dispute settlement mechanism is fairly swift. While it does not guarantee that a decision by the DSB will maintain the agreement that is the object of the parties' dispute, it does provide ample opportunity to resolve the disagreement before it can fall apart.

The applicability of the dispute settlement system to the harmonization of the securities markets arises only when the Members are at odds over an obligation or commitment entered into under the GATS agreement.<sup>126</sup> This will certainly limit its usefulness. The present problem is to arrive at obligations and commitments concerning the global securities markets. Such obligations and commitments are essential for the dispute settlement system to function.

However, in Part II of the GATS, there are general obligations that apply to the Members simply by becoming Members. Obligations would include those dealing with "Recognition" in Article VII<sup>127</sup> and Paragraphs 3.1 and 3.2 of the Annex,<sup>128</sup> which were mentioned earlier. Hypothetically, if a Member believes that another Member is unfairly avoiding its obligation to afford an opportunity to negotiate accession to an agreement, these requirements can be enforced through the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). Admittedly, the DSU will play only a small part in the near future at achieving harmonization. It is when the more specific agreements are entered into, perhaps stimulated by the Article XIX

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surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements." *Id.*, para 2.1, at 114.

<sup>119</sup> *Id.*, para. 12.1, at 120.

<sup>120</sup> *Id.*, para. 12.8, at 121.

<sup>121</sup> *Id.*, para. 12.9, at 121.

<sup>122</sup> *Id.*, para. 16.4, at 123.

<sup>123</sup> *Id.*, para. 17.5, at 123.

<sup>124</sup> The only way a decision of the Appellate Body would not be adopted would be if the party winning the dispute voted at the DSB meeting, along with every other Member at the meeting, not to adopt the decision. *Id.*, para. 17.14, at 124.

<sup>125</sup> *Id.*, para. 20.1, at 125.

<sup>126</sup> GATS, *supra* note 6, art. XXIII, para. 3, at 64.

<sup>127</sup> See *supra* note 104.

<sup>128</sup> See *supra* notes 93-105 and accompanying text.

commitment to negotiate, that the impact of the DSU will be felt.<sup>129</sup>

## V. Conclusion

The GATS is the newest approach available to harmonize the securities regulations of the nations of the world. It holds promise for achieving this goal for several reasons. Up to the present, one of the problems with achieving harmonization has been that no single organization could represent the nations of the world. IOSCO and the FIBV, composed of various government and private groups, do not act on their studies of the securities markets, either for lack of desire to do so or because they lack the ability to implement decisions. The GATS has the potential to change this. The GATS membership represents the governing bodies of the nations of the world. Certainly the GATS members will be influenced by many of the same groups that are members of the FIBV, IOSCO, or other influential organizations; however, a GATS member must ultimately speak for the nation it represents. Whether a member can or cannot commit or oblige to an agreement decides for the member nation the course of action it will take. This should lead to obligations being implemented more quickly, as there are few or no parties to persuade when commitments are made at a GATS meeting. In addition, one of the objectives of the GATS is to motivate liberalization of the Members' laws regulating services. This is accomplished through Article XIX, mandating future meetings with the objective of liberalizing the trade in services. Finally, it is an Agreement that is ready to be utilized. It provides for future discussions to improve the present system, as well as a means to settle disagreements over the commitments made under the Agreement. This makes the GATS the logical approach to pursue harmonization of the global securities markets.

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<sup>129</sup> See *supra* notes 106-11 and accompanying text.

